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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

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No. 70-138

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LYLE KIRKER, ET AL., *Petitioners*,

v.

ARCH A. MOORE, JR., Individually and in His Capacity as Governor of the State of West Virginia, ET AL., *Respondents*.

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## SUPPLEMENTAL BRIEF OF PETITIONERS

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## SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Rule 24 (5) of this Court, petitioners herewith file this Supplemental Brief in support of the petition for writ of certiorari filed herein.

### Recent Action by This Court Militates in Favor of the Granting of the Instant Petition

During the pendency of the petition herein, this Court took action in three cases which demonstrates either that the decision of the court of appeals challenged herein is erroneous or at the very least that the questions presented herein are certworthy.

First, in *Bell* v. *Burson,* 402 U.S. 535 (1971), this Court held that the Georgia Motor Vehicle Responsibility Act denied due process of law to uninsured motorists involved in automobile accidents by requir-

ing the suspension of their driver's licenses without providing a hearing to determine "whether there is a reasonable possibility of a judgment being rendered against [them] as a result of the accident." *Id.* at 542.

Using the impact of the summary revocation of a driver's license as a springboard, this Court elaborated in *Bell* upon the function to be played by the due process clause in connection with the withdrawal of other public benefits or privileges such as welfare, public employment and unemployment compensation:

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.' *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (disqualification for unemployment compensation); *Slochower* v. *Board of Education*, 350 U.S. 551 (1956) (*discharge from public employment*); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (denial of a tax exemption); *Goldberg* v. *Kelly*, *supra* (withdrawal of welfare benefits). See also *Londoner* v. *Denver*, 210 U.S. 373, 385-386 (1908); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117 (1926); *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1941). [Emphasis added] [402 U.S. 535, 539].

In addition to citing *Slochower, supra,* in *Bell* for the proposition that public employees are entitled to

the protections of the Fourteenth Amendment in connection with their discharge, this Court reaffirmed *Slochower* in *Connell* v. *Higginbotham,* 403 U.S. 207 (1971), in the process of striking down as unconstitutional a loyalty oath required as a condition of employment for all public employees in the State of Florida. This Court held that the portion of the oath which required public employees to swear or affirm that they did "not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" fell "within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process" (citing *Slochower*) (403 U.S. 207, 208-9).

Finally, this Court granted the petition for writ of certiorari in *Perry* v. *Sindermann,* 403 U.S. 917 (1971) (No. 952, 1970 Term; renumbered No. 70-36, 1971 Term), in which the Fifth Circuit held that a non-tenured public school teacher was entitled to a hearing as to whether the non-renewal of his teaching contract was "really a form of punishment for his exercise of constitutional rights or otherwise constitutes some actionable wrong" and that such a hearing must be "before an impartial tribunal which must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition" [*Sindermann* v. *Perry,* 430 F. 2d 939, 944 (5th Cir. 1970)].

As the petition herein indicates (pp. 16-7), a substantial conflict exists among the circuits as well as the state courts regarding the foregoing question. Indeed, several petitions are now pending in this Court raising identical or closely related issues concerning the due process rights of teachers and other public employees.

See *Hodgin* v. *Noland,* 435 F. 2d 859 (4th Cir. 1970), *petition for cert. filed* (April 30, 1971) (No. 1657, 1970 Term; renumbered No. 70-141, 1971 Term); *Fooden* v. *Board of Governors,* — Ill. — (1971), *petition for cert. filed* (June 29, 1971) (No. 1901, 1970 Term; renumbered No. 70-354, 1971 Term); *Roth* v. *Board of Regents,* — F. 2d — (7th Cir. 1971), *petition for cert. filed* (August 3, 1971) (No. 71-162, 1971 Term); *Orr* v. *Trinter,* — F. 2d — (6th Cir. 1971), *petition for cert. filed* (August 18, 1971) (No. 71-249, 1971 Term).

Petitioners submit that since the closely related questions presented herein and in *Perry, supra,* involve the interests and constitutional rights of more than 13 million public employees in the United States,[1] the instant petition should be granted and this case should be heard simultaneously with *Perry, supra,* so that the highly significant issues involved may be considered by this Court against the broadest possible factual matrix.

## CONCLUSION

For the additional reasons stated herein, the petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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[1] U. S. Bureau of Labor Statistics, Dep't of Labor, 18 Employment and Earnings 57 (July 1971).